APPEAL NO. 021618
FILED AUGUST 8, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held on June 4, 2002, with the record closing on June 11, 2002, the hearing officer resolved the sole disputed issue by finding that the impairment rating (IR) assigned by the designated doctor is not contrary to the great weight of the other medical evidence and by concluding that the appellant's (claimant) IR is12%, based upon the designated doctor's report. The claimant has appealed, first contending that it was an abuse of discretion for the hearing officer "to not allow the record to remain open for the designated doctor's responses" to the claimant's written deposition questions and, secondly, that the claimant's IR should be the 18% assigned by the treating doctor. The respondent (carrier) urges in its response that the hearing officer did not abuse his discretion and that the evidence is sufficient to support the hearing officer's determination.

DECISION

Affirmed.

The hearing officer did not abuse his discretion in failing to keep the hearing record open after the hearing adjourned on June 4, 2002, in order to receive responses from the designated doctor to questions posed to him in the claimant's deposition. In his report of July 27, 2001, the designated doctor assigned the claimant a 10% rating under Table 49 II E of Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), no rating for sensory or motor loss, and 2% for lateral flexion range of motion (ROM) loss (1% for each side), noting that the claimant's lumbar spine flexion and extension ROM measurements were invalidated by the straight leg raise (SLR) test. The evidence indicated that the claimant underwent fusion surgery at L5-S1 on June 22, 2000, followed by four weeks of physical therapy (PT) and that she did not want to continue with facet injections. The evidence further reflects that on October 17, 2001, the claimant started an additional program of PT with her treating doctor and apparently completed it on January 17, 2002, the date her treating doctor assigned an 18% IR. This rating included a 12% rating under Table IV B of the AMA Guides and 7% for loss of spinal ROM. According to the evidence, the claimant did not file her motion to depose the designated doctor with written questions until May 24, 2002, and the hearing officer signed the order permitting the deposition on May 31, 2002. The claimant represented that she did not receive the signed order until June 3, 2002, the day before the hearing. At the hearing, the claimant first moved for a continuance, which the carrier opposed and the hearing officer denied. The claimant then asked that the hearing record be kept open until such time as she could obtain the responses of the designated doctor. Upon concluding the hearing, the hearing officer advised the parties that if, after reviewing the evidence, he felt he needed the information the deposition

questions were seeking in order to fairly and with full information determine the IR, he would so advise the parties. However, if he did not feel he needed the requested information, he would so advise the parties and close the record. By his letter of June 11, 2002, the hearing officer advised the parties that, after reviewing the evidence, the parties' arguments, the AMA Guides, and the rules of the Texas Workers' Compensation Commission (Commission), he felt he could reach his decision in the case without sending to the designated doctor any questions for clarification.

We are satisfied that, under the particular circumstances of this case, the hearing officer did not abuse his discretion in not keeping the hearing record open for receipt of the designated doctor's deposition responses. The test for abuse of discretion in this case is whether the hearing officer "acted without reference to any guiding rules and principles. [Citation omitted.] Another way of stating that test is whether the act was arbitrary or unreasonable. [Citation omitted.] The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. [Citations omitted.]" Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-242 (Tex. 1985). The claimant had ample time from the January 17, 2002, date she completed the additional PT and received her treating doctor's IR until the 15-day deadline for the exchange of evidence following the April 19, 2002, benefit review conference, to request the Commission to seek the clarification she desired from the designated doctor concerning her ROM testing.

We are similarly satisfied that the evidence sufficiently supports the hearing officer's finding that the designated doctor's report is not contrary to the great weight of the other medical evidence and that the claimant's IR is 12%. *See* Section 408.125(e).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75039.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Robert W. Potts
Appeals Judge